

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



77-7006

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B  
P/S

BISWANOTH HALDER,

Plaintiff-Appellant,

-against-

GENERAL TELEPHONE AND ELECTRONICS  
CORPORATION,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF  
DEFENDANT-APPELLEE



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(6256)

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-----x

BRIEF ON BEHALF OF  
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QUESTION PRESENTED

Whether denial of plaintiff's motion to amend his complaint prevented plaintiff from litigating his entire claim on the merits.

FACTS

Plaintiff commenced this action on October 29, 1974, by filing his complaint in the United States District Court for the Eastern District of New York. The complaint alleged that defendant General Telephone & Electronics Corp. (hereinafter referred to as GTE) violated plaintiff's rights under Title VII of the Civil Rights Act of 1964.

Specifically, plaintiff alleged in his complaint that he had been denied employment as a computer programmer because of his national origin. Plaintiff alleges at paragraph 3 of the complaint that defendant is located at No. One Stamford Forum, Stamford, Connecticut. Paragraph 4 alleges that plaintiff sought employment at 77 "A" Street, Needham Heights, Massachusetts. Attached to the complaint as an exhibit is a copy of plaintiff's complaint filed with the Equal Employment Opportunity Commission. Paragraph 3 of the EEOC complaint alleges that plaintiff was discriminated against by defendant and the address for defendant is given as 730 Third Avenue, New York City. Paragraph 7 of the EEOC complaint relates that GTE's "various divisions advertised frequently in different newspapers for computer personnel....I applied to GTE on different occasions...."

Paragraph 7 of the complaint alleges that plaintiff filed his charges against defendant with the EEOC on May 3, 1971. Paragraph 5 recites that the discriminatory acts occurred on September 30, 1974. Paragraph 11 alleges that the defendant is still committing discriminatory acts against him.

In its answer defendant alleged as a first affirmative defense that plaintiff had not dealt with GTE but with GTE Sylvania Incorporated, a wholly owned subsidiary. A second affirmative defense alleged that GTE Sylvania Incorporated was a necessary party. The burden of these affirmative defenses was that plaintiff had no claim against the named defendant GTE.



By notice of motion dated December 30, 1974, plaintiff moved to amend his complaint for the first time. The proposed amended complaint alleged that defendant GTE had its executive offices at One Stamford Forum, Stamford, Connecticut, and "it does [it did] business at the locations enumerated in paragraph 4 below." Paragraph 4 lists eleven companies where he sought employment and refers to them as GTE's "businesses." He then lists the job applications to the various subsidiaries of GTE and their dates, extending from December 23, 1968 to November 26, 1974. At paragraph 11 he alleges that "Plaintiff believes that the defendant is still committing these acts against him."

Defendant responded to plaintiff's motion for leave to amend by moving to dismiss the action. The basis for the motion was that plaintiff had filed only one complaint with the EEOC, and that was against GTE, and he should not be permitted to make claims based on other job applications which had never been reviewed by the EEOC.

Plaintiff opposed the motion to dismiss by moving for summary judgment. In refuting defendant's argument he stated in his affidavit at paragraph 6 that "plaintiff has in fact exhausted his administrative remedies against the defendant GTE, in its capacity as the holding and controlling parent company."

Plaintiff also made a further motion for leave to amend his complaint. This second proposed amended complaint named each of the GTE subsidiaries, and their individual employees, which had rejected plaintiff's job applications. Plaintiff then realleged each of the

acts of discrimination listed in the first proposed amended complaint and added that they were in violation of the Civil Rights Act of 1866 as well as 1964.

All of these motions were argued and/or submitted on March 21, 1975. Judge Mishler reserved decision on the motions.

By memorandum of decision and order dated April 30, 1975, the Court below granted defendant's motion to dismiss the Title VII action and denied plaintiff's motion for summary judgment and denied his motions for leave to amend to add additional parties and to add a claim for relief under 42 USC 1981. The Clerk was directed to enter judgment in favor of defendant dismissing the complaint. The Court's decision was based on the holding that plaintiff had not commenced the action within 90 days after "receipt of the notice of no reasonable cause...."

By notice of motion dated May 6, 1975, plaintiff moved to alter or amend the judgment on the grounds that the April 30, 1975 decision by Judge Mishler was based on a decision by the Second Circuit Court of Appeals in a case entitled DeMatteis v. Eastman Kodak Company. Plaintiff pointed out that the Court of Appeals was reconsidering its decision.

By notice of motion dated May 12, 1975, plaintiff moved for leave to serve a third, and different, amended complaint. This proposed amended complaint alleged causes of action only against GTE and its subsidiary corporations, and not against individuals.



Paragraph 16 for the first time asserted a claim that he was discriminated against "because of his color, religion, national origin and alienage..."

On May 16, 1975, Judge Mishler adjourned both of plaintiff's motions without date pending action by the Second Circuit Court of Appeals in DeMatteis v. Eastman Kodak (511 F.2d 306).

By order dated February 5, 1976, Judge Mishler (in light of the decision in the DeMatteis case) vacated the judgment dismissing plaintiff's complaint and reinstated both the original complaint and the original answer. The case was reached for trial on February 10, 1976, but adjourned without date to permit plaintiff to complete discovery.

The discovery which plaintiff sought was answers to two sets of interrogatories. The first set asked for, and defendant provided, information with respect to each of the subsidiaries of GTE, such as states where they do business, names of officers and directors, the relationship between each subsidiary and GTE and whether they file separate tax returns and keep separate records, whether each subsidiary advertised for computer programmers or analysts. Copies of GTE's annual reports were provided.

The second set of interrogatories asked for, and defendant provided, information with respect to various of the GTE subsidiaries such as employment discrimination complaints made against them. Answers to both sets of interrogatories were filed in June of 1976.

The case was tried before Judge Mishler without a jury on November 26, 1976. Plaintiff refused to offer any proof. Defendant's proof established that GTE and its subsidiaries do not discriminate in employment. Judge Mishler directed entry of judgment in favor of defendant.

#### ARGUMENT

PLAINTIFF HAD THE OPPORTUNITY, AND  
REFUSED IT, TO PROVE HIS ENTIRE  
CLAIM AGAINST GTE AND ITS SUBSIDIARIES.

In his brief plaintiff argues that he was prevented from proving his claim against GTE and its subsidiaries because the Court denied his various motions for leave to amend his complaint. He further argues that "the complaint had to be exhaustive and that it had to include all the dates on which discriminatory acts occurred..." and that is why he moved to amend. (Page 10 of plaintiff's brief.)

In fact, the Court below considered the complaint to allege a pattern of discrimination on the part of defendant GTE and its subsidiaries. Defendant GTE's motion to dismiss (docket no. 11) contains the affidavit of Joel P. Mellis, corporate secretary of GTE, which states that GTE has no employees but is merely a holding company. It follows that GTE does not discriminate in employment practices except in so far as its subsidiaries discriminate. The Court expressly declined to go into that issue in its decision dated April 30, 1975,



which denied plaintiff's motion to amend and granted defendant's motion to dismiss on statute of limitations grounds.

Following the dismissal, the DeMatteis decision required the Court to vacate its order and restore the Title VII action. This was done on February 5, 1976. The case was reached for trial on February 10, 1976, but adjourned to permit plaintiff to complete discovery. The discovery, in the form of interrogatories, in so far as permitted by the Court was in no way limited to GTE but included each of the subsidiaries which had allegedly discriminated against plaintiff. Plaintiff was given a great deal of material relative to each subsidiary and was never denied the right to pursue his leads, if any, through further discovery. Other than the mere fact, or allegation, of a rejection for employment, plaintiff has never given the Court any factual support for his contention that he was discriminated against.

Plaintiff alleged before the EEOC and in each of the actions he has started that the various large electronic or computer companies are discriminating against him. In support of his argument he cites many rejections by many companies as showing a discriminatory pattern. His various EEOC complaints and civil actions were his opportunity to prove that each defendant was a part of that pattern of discrimination.

On the trial of this action plaintiff refused to offer any evidence against GTE or any of its subsidiaries. The result would have been no different had he received leave to amend. Plaintiff had obtained

all proper discovery against the subsidiaries which he had asked for. That was in June of 1976. Never has plaintiff made any factual showing whatsoever that GTE or any of its subsidiaries discriminated against him.

It is respectfully submitted that leave to amend the complaint was properly denied on each occasion. Rule 15(a) of the Federal Rules of Civil Procedure, in so far as applicable to this case, provides that "a party may amend his pleading only by leave of court....and leave shall be freely given when justice so requires." This is to permit cases to be decided upon their merits rather than on technicalities. Reaves v. Sielaff, 382 F.Supp. 472 (D.C.Pa., 1974). The present case was tried on its merits and no defect or deficiency in the complaint prevented plaintiff from proving his claim.

Nor should plaintiff's good faith be assumed. He has been before this Court and before Judge Mishler many times. Never has he offered proof of his claims. He offers only conclusory allegations. The record on appeal in this case makes it abundantly clear that plaintiff has no claim, has no proof of a claim after extensive discovery, and will acquire no claim by any amendment to his complaint.

#### CONCLUSION

On the facts of this case and the law applicable thereto, the



judgment of the Court below should in all respects be affirmed.

Respectfully submitted,

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MICHAEL R. TREANOR,  
of counsel

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss .

JULIO VALLEJO, JR., being duly sworn,  
deposes and says that deponent is not a party to the action,  
is over 18 years of age and resides at 703 REMSEN AVE.  
BROOKLYN, NYC.

That on the 13 day of APRIL, 19 77,  
deponent personally served the within BRIEF ON BEHALF OF  
DEFENDANT - APPELLEE  
upon the attorneys designated below who represent the  
indicated parties in this action and at the addresses below  
stated which are those that have been designated by said  
attorneys for that purpose.

~~By leaving true copies of same with a duly  
authorized person at their designated office.~~

By depositing 2 true copies of same enclosed  
in a postpaid properly addressed wrapper, in the post office  
or official depository under the exclusive care and custody  
of the United States post office department within the State  
of New York.

Names of attorneys served, together with the names  
of the clients represented and the attorneys' designated  
addresses.

BISWANOTH HALDER  
PLAINTIFF-APPELLANT PRO SE  
173-17 65<sup>th</sup> AVE.  
FLUSHING, N.Y. 11365

Sworn to before me this

13<sup>th</sup> day of April, 19 77  
Michael DeSantis

MICHAEL DeSANTIS  
Notary Public, State of New York  
No. 03-0930908  
Qualified in Queens County  
Commission Expires March 30, 1979

Julio Vallejo Jr